NO. 45881-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MARYANNE LINDEBLAD, in her official capacity as Director of Washington State Health Care Authority, and WASHINGTON STATE HEALTH CARE AUTHORITY,

Appellants,

COORDINATED CARE CORP.; UNITEDHEALTHCARE OF WASHINGTON, INC.; and AMERIGROUP WASHINGTON, INC.,

Intervenors,

v.

COMMUNITY HEALTH PLAN OF WASHINGTON, a Washington Health Plan, and MOLINA HEALTHCARE OF WASHINGTON, INC., a Washington corporation,

Respondents.

OPENING BRIEF OF APPELLANTS

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I. INTRODUCTION

The Legislature decided to expand the Medicaid program for low-income Washington citizens in the wake of the enactment of the federal Patient Protection and Affordable Care Act of 2010, 124 Stat. 119, Pub. L. 111-148, 111-152 ("Affordable Care Act"). To lay the groundwork for the Medicaid expansion, the Legislature directed the Health Care Authority ("Authority") to engage in a competitive contract procurement with the intent of attracting new Medicaid managed care organizations to Washington that would provide economical and efficient care to Medicaid enrollees. As a result of the procurement, the Authority entered into substantively identical contracts ("Contract") with three companies new to Washington's program ("New Plans") and two incumbent companies ("Legacy Plans").[1] The Contract accomplishes the Legislature's goal by including a methodology under which a proportionally higher share of new Medicaid enrollees goes to the New Plans. The Legacy Plans claim the Authority breached the Contract by implementing those goals.[2]

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[1] The Legacy Plans are respondents Community Health Plan of Washington ("CHPW") and Molina Healthcare of Washington, Inc. ("Molina"). The New Plans are intervenors Amerigroup Washington, Inc.; Coordinated Care Corporation; and UnitedHealthcare of Washington, Inc. CP 2502-03.

[2] On September 8, 2014, the Authority and Molina entered into a settlement agreement to resolve their disputes. A stipulated order dismissing Molina from the case has been presented to the trial court and is awaiting entry.

In granting the Authority's Motion for Discretionary Review, the Commissioner of this Court correctly held that the trial court committed obvious error in granting summary judgment to the Legacy Plans. Ruling Granting Review dated May 2, 2014; CP 3329 (trial court's order on Motion on Substantive Claim); CP 3334 (trial court's order on Motion on Procedural Claim); RP 1 (January 15, 2014). There are genuine issues of material fact regarding the meaning and intent of the Contract, which the trial court ignored and which preclude summary judgment. Ruling Granting Review at 17. The Court should reverse the trial court.

II. ASSIGNMENTS OF ERROR

A. Assignments Of Error

1. The trial court erred in granting the Motion for Summary Judgment on the Legacy Plans' Substantive Claim.

2. The trial court erred in granting the Motion for Summary Judgment on the Legacy Plans' Procedural Claim.

B. Issues Pertaining To Assignments Of Error

1. In the Order on Substantive Claim, did the trial court err by ruling as a matter of law that the Authority breached the plain language of the Contract by correcting its initial but mistaken implementation, where (a) there are genuine issues of material fact regarding the meaning of the Contract and the procurement documents, the express purposes of which

were to provide an increased share of Medicaid business to the New Plans; and (b) the trial court balanced competing extrinsic evidence and resolved genuine issues of material fact concerning the alleged breach, instead of allowing the jury to decide the factual disputes?

2. In the Order on Procedural Claim, did the trial court err by ruling as a matter of law that the Authority breached the plain language of the Contract by allowing its Director, rather than a subordinate, to issue a final determination on dispute resolution claims brought by the Legacy Plans, where (a) the dispute resolution clause in the Contract and governing law allow the Director to make the final decision; and (b) there are genuine issues of material fact concerning the alleged delegation of power from the Director to the subordinate on a significant issue of public policy?

3. In both orders, did the trial court err by ruling as a matter of law that the Legacy Plans established the elements of causation and damages, where the Legacy Plans failed to introduce any evidence of those elements or brief the issues?

III. SUMMARY OF ARGUMENT

In preparation for the State's implementation of the Affordable Care Act, the Authority issued a Request for Proposals ("RFP") for managed care organizations to participate in the Medicaid program.

CP 2502, 2723. The RFP specifically called for companies that would be new to Washington to receive the lion's share of new Medicaid enrollees. The RFP and the Contract allowed the Legacy Plans to retain the enrollees they had under the former contract and also entitled them to a percentage of new enrollees. Despite these benefits, the Legacy Plans claim the Authority breached the Contract by awarding a higher percentage of new enrollees to the New Plans. CP 1573; Ruling Granting Review at 4-5.

The trial court granted the Legacy Plans' two motions for summary judgment. CP 3329, 3334; RP 58-70 (January 15, 2014). With respect to the Motion on Substantive Claim, the trial court weighed the evidence instead of determining whether genuine issues of material fact were present. Ruling Granting Review at 14-16; RP 61-66 (January 15, 2014). The Legacy Plans and the trial court did not rely on the plain language of the Contract, the RFP, or the Authority's rules. Instead, they focused on the Authority's initial but mistaken implementation of the Contract and other extrinsic evidence, while disregarding substantial contrary evidence. CP 1577-93; RP 61-66 (January 15, 2014).

With respect to the Motion on Procedural Claim, the Legacy Plans and the trial court engaged in a flawed interpretation of the Contract's dispute resolution clause to bind the Authority to a draft recommendation

of an Authority employee, rather than the ultimate decision of the Authority's Director. Ruling Granting Review at 16.

In both orders, the trial court "presumed" the existence of causation and damages (two of the four elements of a breach of contract action), even though the Legacy Plans presented no evidence or argument on those elements. Ruling Granting Review at 10; RP 63 (January 15, 2014). By relieving the Legacy Plans of their burden of proof, the trial court did not adhere to the test clearly enunciated in CR 56 and case law interpreting what is required of the moving party.

IV. STATEMENT OF THE CASE

A. The Medicaid Program And Federal Healthcare Reform

Under the original version of Medicaid enacted in 1965, Congress "offers federal funding to States to assist pregnant women, children, needy families, the blind, the elderly, and the disabled in obtaining medical care." *Nat'l Fed'n of Indep. Bus., et al., v. Sebelius*, 132 S. Ct. 2566, 2581, 183 L. Ed. 2d 450 (2012) (citing 42 U.S.C. § 1396a(a)(10)). In the Affordable Care Act, Congress essentially created a brand-new Medicaid program that covers anyone with an income below 133% of the federal poverty level. *Nat'l Fed'n*, 132 S. Ct. at 2601, 2605. As a result, Medicaid was transformed into "an element of a comprehensive national

plan to provide universal health insurance coverage." *Nat'l Fed'n*, 132 S. Ct. at 2606.

States have the option of whether to expand Medicaid under the Affordable Care Act and thereby receive substantial amounts of federal funding. *Nat'l Fed'n*, 132 S. Ct. at 2601, 2604-05. As part of a reform package in 2011, the Legislature decided to adopt the Medicaid expansion and to transfer its administration to the Authority. Laws of 2011, 1st Spec. Sess., ch. 15, § 1; *see also* RCW 74.09.530(1)(a).

The majority of Medicaid clients receive healthcare through managed care organizations (a type of insurance company) rather than directly from hospitals, doctors, and other providers. RCW 74.09.522(2), (6); CP 2501. During the time period of this case, Washington's Medicaid managed care program was called "Healthy Options." *St. John Med. Ctr. v. Dep't of Soc. & Health Servs.*, 110 Wn. App. 51, 56, 38 P.3d 383, *review denied*, 146 Wn.2d 1023 (2002); CP 2501 (¶ 5(a)).

B. The Legislature Directed The Authority To Procure New Contracts Geared Toward New Entrants In The Market

As part of its reform package in 2011, the Legislature passed a budget proviso requiring the Authority to focus on overall costs when procuring new Healthy Options contracts. Laws of 2011, 1st Spec. Sess., ch. 50, § 213(32) (Authority must "place substantial emphasis upon price

competition" and not "increase the actuarial cost of service"); RCW 74.09.522(5) (importance of competition in Medicaid managed care). The Authority carried out the procurement in 2011-12, with the intent to increase competition, foster innovation, and develop capacity to meet the needs of Medicaid under the Affordable Care Act. CP 2515 (RFP § A.1); CP 2502 (¶¶ 6-8); CP 2188 (¶ 4).

The Authority selected the Legacy Plans and the New Plans as the winning bidders, all of whom signed the Contract in March 2012. CP 2502-03 (¶¶ 9-12).

C. The Legislature, The Governor, And A Federal Court Rejected The Legacy Plans' Attempts To Reverse The Procurement

The Legacy Plans, concerned about the effect of the RFP on their market share, undertook a concerted effort in 2011 and 2012 to reverse key aspects through political lobbying and litigation. The Legacy Plans wanted the Authority to "throw out" the proposed method for assigning enrollees to the Plans when the enrollees did not make their own choice. CP 3038-41 (80:6-83:22). CHPW attempted to identify legislators who would "stop things" such as giving the New Plans "advantage in enrollment assignment so they can build their plans up." CP 3142. CHPW prepared talking points for legislators against the methodology. CP 3148; CP 3139 (CHPW talking points for the Speaker of the House,

stating that CHPW "wants the state to throw out their intended assignment methodology" and acknowledging the "original intent of giving new plans 50% of the new assignment off the top was to help them build their enrollment.").

In addition, CHPW lobbied the Legislature in 2012 to adopt a budget proviso to reverse the procurement (Laws of 2012, ch. 7, § 213(45)), which the Governor vetoed:

> Section 213(45) . . . requires a rebidding process in counties where a certification cannot be established and prohibits a reversion to fee-for-service as a result of the procurement process. *I am concerned that this proviso circumvents state laws requiring competitive procurements to be free from influence or bias. Competitive procurements ensure that public contracts are awarded based on quality and cost.* The [Authority] recently completed its procurement process for Medicaid managed care services. *New competitors in the market were able to offer innovative proposals without sacrificing access or quality of care, saving taxpayers $131 million* in this biennium. This was done under the specific directive in this operating budget to "place substantial emphasis upon price competition in the selection of successful bidders," when awarding managed care contracts for Medicaid enrollees. *A federal judge recently upheld the competitive process. Unfortunately, some competitors did not compete on price, quality, and innovation criteria.* This result is what we expect from a competitive procurement process. For these reasons, I have vetoed Section 213(45).[3]

[3] *See* Governor's Veto Message dated May 2, 2012, p. 3 (emphasis added), available at http://apps.leg.wa.gov/documents/billdocs/2011-12/Pdf/Bills/Vetoes/ House/ 2127-S.VTO.pdf (viewed December 4, 2013).

The litigation cited in the Governor's veto message was a federal lawsuit by CHPW and another incumbent contractor in early 2012, trying to prevent the Authority from executing the Contract with the New Plans. CP 404 (Complaint for Declaratory and Injunctive Relief, Clark County Superior Court Cause No. 12-2-00830-6; U.S. District Court Case No. 3:12-cv-05174). CHPW argued the New Plans had inadequate networks of providers. The case ended after the federal court denied two motions for injunctive relief. The Legacy Plans then began to pursue the claims that resulted in this case.

D. The Contract And RFP Gave Favorable Enrollment To The New Plans In Preparation For Medicaid Expansion

1. All Individuals Who Are Joining Medicaid In Any Given Month Are Included In The Mathematical Equation That Determines Each Plan's Enrollment

The central issue in this case is how the Authority must allocate Medicaid clients to the Plans when the clients do not make their own choice. Ruling Granting Review at 7, 11-16; CP 493, 733. In particular, which individuals are included in the universe of individuals ("Assignment Pool") to which the Authority applies an allocation algorithm ("Assignment Methodology").

The Authority and the New Plans contend the Assignment Pool includes *all* individuals who do not affirmatively select a Plan.

CP 1577-79. The Legacy Plans contend that enrollees affected by the Authority's "Plan Reconnect" and "Family Connect" policies (which are described below) must be excluded. CP 1577-87.

To put the issue into mathematical terms, the issue is the size of the population included in the denominator for purposes of the Assignment Methodology. When Plan Reconnect and Family Connect enrollees are *included* in the pool, then because of how the methodology works, more enrollees are available to the New Plans. Conversely, removing those populations from the denominator shrinks the number of enrollees that ultimately are available to the New Plans. CP 494 (¶ 13); CP 496 (¶16(b)).

2. The Assignment Methodology Was Intended To Give The New Plans A Firm Basis For Medicaid Expansion

To meet the Legislature's requirements, and to prepare for Medicaid expansion, the Assignment Methodology heavily favors new entrants in the market. CP 2724 (17:8-25); CP 212 (¶ 7); CP 1051 (¶ 6). As the Authority and the New Plans testified, new entrants must have sufficient membership numbers to become viable. CP 2505 (¶ 21); CP 2341 (¶ 7). By helping the New Plans quickly grow their membership, the Medicaid program benefits through competition while Medicaid enrollees benefit from having additional choices. CP 2505 (¶ 21).

3. Everyone Eligible For Healthy Options, But Not Yet Enrolled In The Program, Is A "Potential Enrollee" Who Becomes Part Of The Assignment Pool

Under the contract, the term "potential enrollee" means any person who is eligible for enrollment in Healthy Options but not yet actually enrolled with a Plan. CP 2559 (Contract, § 1.70). Therefore, a potential enrollee can be someone who either has or has not affirmatively chosen a Plan. CP 2537-38 (RFP § D).

A person who does choose a Plan is enrolled with that Plan. CP 2594 (Contract § 5.13). A person who does not choose a Plan is assigned to one under the Assignment Methodology. CP 2594 (Contract § 5.14.1). For this purpose, three categories of potential enrollees are included in the Assignment Pool:

- If a person has a family member enrolled with a Plan, then the Authority will assign the person to that Plan. This is called the "Family Connect" policy. *See* WAC 182-538-060(8)(a).

- If a person had been enrolled with a Plan within the past 12 months, and now is regaining Medicaid eligibility, then the Authority will re-assign the person to that Plan. This is called the "Plan Reconnect" policy. *See* WAC 182-538-060(8)(b).

- All other potential enrollees who do not choose a Plan.

The Assignment Methodology is contained in Section 5.14.1.1 of the Contract and Section D of the RFP. Section 5.14.1.1 provides that "For the period July 1, 2012 through December 31, 2013, assignments will

be made as described in the [RFP] that resulted in this Contract." CP 2594. Section D of the RFP describes the "methodology by which [the Authority] will assign Healthy Options enrollees that do not make a choice." CP 2538 (RFP § D).

The Contract and the RFP do not exclude Family Connect and Plan Reconnect clients from the definition of "potential enrollee" or from the Assignment Pool. CP 2559 (Contract, § 1.70). Family Connect and Plan Reconnect clients are assigned in accordance with WAC 182-538-060; however, the total number of assignments is determined by the Assignment Methodology, which includes all enrollees who do not make a choice. CP 2538 (RFP § D). The net effect is the New Plans receive a disproportionate share of enrollees who do not already have a family or personal connection to a Plan, because the Legacy Plans receive almost all of the Family Connect and Plan Reconnect enrollees.

Indeed, approximately 70% of monthly enrollment is comprised of Plan Reconnect or Family Connect enrollees. CP 3207. Excluding those enrollees from the Assignment Pool would result in the Legacy Plans receiving the majority of new enrollees, as well as the returning enrollees, which would directly contradict the intent of the Contract and RFP.

4. The Legacy Plans Knew The Assignment Methodology Differed Substantially From Prior Medicaid Contracts

The Assignment Methodology is an entirely new way of assigning clients, differing substantially from prior contracts (to which the Legacy Plans were parties, but the New Plans were not). Under prior contracts, the State assigned enrollees who did not choose a Plan based simply on a company's capacity. Molina's CR 30(b)(6) witness explained that his company would "call out a capacity" of enrollment and "be given membership [by the Authority] up to that level." CP 2740-41 (27:6-28:1-5).

The prior contracts reflect this capacity-based assignment system and the lack of any weighted-percentage assignment. CP 2743 (32:1-15); CP 2824 (2008-09 Molina contract with State, § 7.14); CP 2959 (2008-09 CHPW contract with State, § 7.14). The Legacy Plans confirmed the RFP represented a significant change. CP 2743 (32:9-15); CP 3029-30 (email detailing for CHPW's CEO and others the "many critical changes" in the Contract, including "fundamental changes in member assignment" and that "Plans no longer will set their own capacity."). The Legacy Plans acknowledged the Assignment Methodology would quickly bolster enrollment in the New Plans. CP 3064; CP 3067 ("The state is using the [Assignment Methodology] to help the new plans grow membership more quickly"); CP 3070 (Molina FAQ stating that "[Legacy Plans] will receive a lower number of assignments [than New Plans]"); CP 3072 (Molina Oct.

2011 Q&A submission No. 4, asking the Authority to reconsider the Assignment Methodology's design to "help new plans grow membership more quickly"); CP 3077 (Vendor Question Matrix No. 2, noting the Assignment Methodology "significantly disadvantages [Legacy Plans]; the Authority responding that the process would be described in the RFP). CHPW believed the methodology placed its business at an "incredible disadvantage" by "discriminat[ing] against existing plans." CP 3139; *see also* CP 3064.

5. The Legacy Plans Had Multiple Opportunities To Explore Differences Between The Contracts

During the RFP process, the Legacy Plans had many opportunities to investigate and understand the methodology changes. The Authority hosted All-Plan Meetings to exchange information regarding how enrollees would be assigned. CP 2313 (¶ 5). Plans also could submit questions about the RFP, which the Authority tracked in a "Q&A" log. CP 3076; CP 3032 (submission from Molina); CP 2744-45 (46:23-47:1) (confirming Molina's utilization of Q&A).

Instead of taking advantage of these opportunities, Molina "assumed" the pool would exclude Family Connects and Plan Reconnects. CP 2746-47 (72:7-73:1). CHPW was unaware of the Authority "ever

communicat[ing]" that those clients would be excluded. CP 3057 (139:8-16).

The Legacy Plans cannot point to any document or communication supporting the contention that the Assignment Methodology excludes Family Connects and Plan Reconnects. The Legacy Plans cite to an Authority presentation at an All-Plan Meeting on February 24, 2012. CP 2318-22. The presentation noted the Family Connect and Plan Reconnect policies would remain in place, but it did not say the affected clients would be excluded from the Assignment Pool. CP 2320, CP 2189 (¶ 7). If such a statement had been made, the New Plans would have taken notice and likely would not have bid, as they believed the methodology would include all potential enrollees. CP 2314 (¶ 9); CP 2189 (¶¶ 6-7); CP 2341 (¶ 7).

E. Assignment Information From The Authority Did Not Exclude Plan Reconnects And Family Connects From The Methodology

After the parties executed the Contract, the Authority provided the Plans with information to assist in their enrollment forecasting ("Assignment Matrices"). CP 2315 (¶¶ 10, 11); CP 2336 (Ex. D); CP 2189 (¶ 8); CP 2200 (Ex. B). The Assignment Matrices provided a county-by-county, Plan-by-Plan delineation of the expected enrollment proportions for Healthy Options. CP 2315 (¶ 11); CP 2336 (Ex. D). The

matrices informed the Plans' forecasting of expected enrollment based on the Assignment Methodology. CP 2315 (¶ 12); CP 2189 (¶ 8); CP 2230 (¶ 6); CP 2763-66 (137:8-140:14) (Molina's use of matrix for July 1 to "try and figure out what [its] membership numbers might look like"); CP 3155, CP 3150 (emails regarding use, validation, and analysis of the July 1 matrix relative to Molina's projections). There is no mention in any matrices before July 2012 that the enrollment proportions excluded Family Connects or Plan Reconnects from the methodology. Moreover, the Matrices predicted that enrollments of new enrollees for the New Plans would significantly exceed that of the Legacy Plans. CP 2205-25.

F. The Authority Incorrectly Implemented The Assignment Methodology But Promptly Corrected The Error

1. All Plans Were Initially Assigned An Incorrect Number Of Enrollees

The Authority began assigning enrollees to the Plans in June 2012, and services under the Contract began on July 1, 2012. CP 2230 (¶¶ 8-9). Shortly thereafter, the New Plans discovered the Authority was misapplying the Assignment Methodology. *Id.*; CP 1050-51 (¶ 5); CP 2190 (¶ 10). The New Plans identified a substantial shortfall in their actual versus projected enrollment based on the Assignment Matrices. CP 2316 (¶ 14); CP 2231-32 (¶¶ 13-15); CP 2190 (¶ 10); CP 1050-51 (¶ 5). The Authority agreed to investigate. CP 2190 (¶ 11); CP 2505 (¶ 22).

In contrast, the Legacy Plans had predicted declines in enrollment, but the opposite occurred. Molina was "drowning" in enrollees (CP 3164), having received 22,745 more enrollee member-months than budgeted for in July.[4] CHPW received "double" its expected enrollment for July, when it had forecast the Assignment Methodology would lead to "a continual decline in enrollment." CP 3042 (100:11-20); *see also* CP 3166; CP 3179 (CHPW "surprised" by level of enrollment); CP 3167 (July assignments substantially higher than projected). CHPW's forecasting did not exclude Family Connects and Plan Reconnects from its apportioned share. CP 3172; CP 3043-44 (107:10-108-15) (CHPW's corporate representative conceding same).

2. The Authority Had Not Included The Assignment Methodology In Its Computer System

After investigating, the Authority informed the Plans it had failed to include Family Connects and Plan Reconnects in the Assignment Pool. CP 2661. The result is that the Authority used the correct formula of weighted-percentage apportionments under Section D of the RFP, but applied the formula to an incorrect population. CP 2505-06 (¶ 24); CP 2661 (Ex. C-3); CP 2727 (50:13-51:2). In July and August 2012, the error resulted in misallocating approximately 44,000 enrollees to the

[4] CP 3161 (22,745 is the sum of Molina's July 2012 over-enrollment for the three populations within Healthy Options); CP 2755-62 (119:11-126:1-15) (discussing how to interpret CP 3161).

Legacy Plans. CP 2664-65; CP 2247-48; CP 2250. The mistake was exactly the opposite of the intent of the Contract and RFP. The Legacy Plans knew of the mistake and knew corrective action was coming. CP 3181 (the Authority "has made a mistake on the enrollment assignment. Glen [Bogner, Molina's president] has been waiting for this . . . CHPW and Molina have the most to lose."); CP 3185 ("the State as [Mr. Bogner] has been fearing believes they made a mistake with the algorithm").

The problem occurred because the Authority's computer system, "ProviderOne," was not updated before assignments began in June 2012. CP 2505 (¶ 23). ProviderOne contains the technical algorithm under which Medicaid clients are assigned to the Plans. *Id.* In May and June 2012, the Authority suspended assignments under the prior contract so it could update ProviderOne to account for the new Assignment Methodology. CHPW knew the computer program would be modified. CP 3190 (No. 2, CHPW acknowledging that suspending enrollment was done to allow the Authority "to make program modifications to ProviderOne for the new contracts").

In turn, the reason ProviderOne had not been updated was a miscommunication among Healthy Options staff members. The employee responsible for sending the correct assignment percentages to ProviderOne (Andree Balzer) did not include Family Connects and Plan Reconnects in

the Assignment Methodology, contrary to the expectation and understanding of the program manager (Preston Cody). CP 2725-26 (36:17-39:5); CP 3196-97 (148:19-149:6) ("[Ms. Balzer] wouldn't be making policy decisions about [the] system or other managed care policy decisions because she was primarily -- I'd call her more of a technical person responsible for this function."). Ms. Balzer ultimately reports to Mr. Cody. CP 2725 (36:17-21).

G. The Legacy Plans Requested Dispute Resolution To Contest The Authority's Correction Of The Error

The Authority corrected the Assignment Methodology error as of November 1, 2012, prompting the Legacy Plans to request informal dispute conferences under the Contract. CP 2506. Section 2.9.2 of the Contract outlines a process to "address" the matter. CP 2566 (Contract, § 2.9.2). The Director of the Authority ultimately advised all five Plans it made a mistake when initially implementing the methodology and that the November correction was a proper interpretation. CP 2294-95 (¶¶ 19-20); CP 2507 (¶ 29), CP 2710-11 (Ex. C-15).

Section 2.9.2 provides that the Director "shall render a written recommendation" after the dispute conferences and "may appoint a designee to hear and determine the matter." CP 2566 (Contract, § 2.9.2). The Director appointed employee Clayton King to hear the conferences.

CP 2293-94 (¶ 15). Mr. King's typical duties are as a "review judge" on appeals from administrative hearings. CP 2293-94 (¶ 15). Mr. King facilitated separate conferences for CHPW and Molina. CP 2293-94 (¶ 15). The Director never delegated authority to make a final decision. *Id.* Mr. King knew he would have to consult with the Director. CP 3212 (25:2-7), 3213-14 (50:19-51:3), 3216 (83:19-23). He informed CHPW and Molina he was not acting as a judge, would make recommendations to the Director, and would not independently issue a decision. CP 2265-66 (¶¶ 6-7).

The Legacy Plans argued the Authority's correction of the error was a "unilateral amendment" of the Contract. CP 1719. In his draft recommendation, Mr. King agreed. CP 2294 (¶ 17). But the draft did not address the Contract's plain language or whether the Authority's correction merely implemented the Contract's intent. Ultimately, the Director recommended the Authority and all five Plans engage in a facilitated discussion. CP 2507 (¶ 27). After attempts at consensus failed, the Director issued her decision that the Authority's November interpretation and correction were appropriate. CP 2294-95 (¶¶ 19-20); CP 2507 (¶ 29).

H. Procedural History

The Legacy Plans sued the State for breach of contract in November 2012, failed the following month to obtain a preliminary injunction, and ultimately nonsuited their claims for equitable relief. The trial court granted the Legacy Plans' two motions for summary judgment in January 2014. In the Motion on Substantive Claim, the Legacy Plans asserted the Authority had unilaterally amended the Contract in November 2012 instead of merely correcting an error. CP 1573. In the Motion on Procedural Claim, the Legacy Plans asserted the Authority must be bound by Mr. King's draft recommendation. CP 1957.

This Court stayed the trial court proceedings and granted review of the trial court's orders under the "obvious error" standard of RAP 2.3. Ruling Granting Review at 17.

V. ARGUMENT

A. The Court Reviews The Trial Court's Orders De Novo

This Court undertakes a de novo review of a trial court's orders on summary judgment. *Bank of Am., N.A. v. Owens*, 173 Wn.2d 40, 48-49, 266 P.3d 211 (2011). Summary judgment is appropriate if the Court finds, after viewing all the evidence and making all reasonable inferences in the light most favorable to the nonmoving party, that (1) there is no genuine issue of material fact; (2) reasonable persons could reach only one

conclusion; and (3) a party is entitled to judgment as a matter of law. *Owens*, 173 Wn.2d at 49.

"[T]he court's function is to determine whether a genuine issue of material fact exists, not to resolve any existing factual issue." *Balise v. Underwood*, 62 Wn.2d 195, 199, 381 P.2d 966 (1963); *see also Michelbrink, Jr. v. State*, 180 Wn. App. 656, 666-68, 323 P.3d 620 (2014). If the Court must weigh "competing, apparently competent evidence, then summary judgment is improper" and this Court "will reverse and remand for a trial to resolve the factual issues." *Kreidler v. Cascade National Insurance Co.*, ___ Wn. App. ___, 329 P.3d 928, 932-33 (2014) (quotation marks and citation omitted).

Even when the facts are undisputed, summary judgment is inappropriate if reasonable minds could draw different conclusions from those facts. *Peterson v. Peterson*, 66 Wn.2d 120, 124, 401 P.2d 343 (1965). The moving party bears the burden of showing the absence of an issue of material fact. *Burton v. Twin Commander Aircraft LLC*, 171 Wn.2d 204, 222, 254 P.3d 778 (2011). If the moving party satisfies its burden, the nonmoving party must then "establish the existence of an element essential to [its] case, and on which that party will bear the burden of proof at trial[.]" *Burton*, 171 Wn.2d at 223 (citations omitted). If the

nonmoving party does not succeed, then summary judgment must be granted. *Id.*

Doubts regarding the existence of a genuine issue of material fact are resolved against the moving party. *Atherton Condo Apartment-Owners Bd. of Dir. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). "A genuine issue of material fact exists where reasonable minds could differ on the facts controlling the outcome of the litigation." *Ranger Ins. Co. v. Pierce Cnty.*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008).

B. The Court Should Reverse The Trial Court's Granting Of The Motion On Substantive Claim

1. The Trial Court Erred In Its Application of CR 56

The Court should reverse the Order on Substantive Claim because the Legacy Plans have not met their burden of showing that there are no genuine issues of material fact and that they are entitled to judgment as a matter of law. *Owens*, 173 Wn.2d at 49. At minimum, the Authority has established genuine factual issues regarding the parties' interpretations of the Contract, which would require the Court to remand the case for trial.

The trial court failed to apply CR 56(c), as the Commissioner recognized. Ruling Granting Review at 14-16. The trial court reviewed the extrinsic evidence, but then resolved the factual issues against the

Authority instead of acknowledging the reasonableness of the State's position, construing the evidence in the light most favorable to the State, and allowing the jury to decide the proper interpretation. *See generally* RP 58-66 (January 15, 2014). For example, the trial court disregarded the Authority's evidence regarding (1) the overall intent of the Authority to implement the Affordable Care Act by attracting new companies to Washington's market; (2) the expectations of all the Plans in 2011 about how the RFP would affect their market share under the Contract; (3) the legislative lobbying efforts of the Legacy Plans, which were based on their understanding of how Medicaid clients would be assigned under the RFP and the Contract, in favor of the New Plans; (4) the differences between the former contract and the new Contract regarding the assignments of Medicaid clients; and (5) testimony from the New Plans on their understanding of the Assignment Methodology and submission of bids based on that understanding. Instead, the trial court simply said, "I'm going to call this the way I see it." RP 59 (January 15, 2014). The errors surrounding the misapplication of CR 56 cannot be hermetically sealed; they affected the orders on both claims.

In contending the Authority's November 2012 correction of the erroneous July 2012 implementation was a unilateral amendment of the Contract, the Legacy Plans failed to demonstrate the absence of genuine

issues of material fact. The Legacy Plans' attempt to interpret the Contract and extrinsic evidence in their favor only highlights that there are disputes of material fact. Not only is there a disputed issue of material fact regarding the meaning of the Contract, but the material facts are overwhelmingly contrary to the Legacy Plans' interpretation, because the purpose of the RFP and the Contract was to disproportionately favor the New Plans by incentivizing them to enter the State's Medicaid market and ensure their viability. The Legacy Plans recognized this in their intense lobbying of legislative leadership in attempts to reverse the RFP. The trial court improperly resolved these issues of material fact when it granted summary judgment, and those orders should be reversed.

2. The Legacy Plans Have Not Established That The Authority Breached Any Duty

a. The Plain Language Of The Contract And RFP Includes Family Connects and Plan Reconnects In The Assignment Methodology

A contract must be read as a whole, giving effect to all of its provisions. *Berg v. Hudesman*, 115 Wn.2d 657, 667-69, 801 P.2d 222 (1990). Courts cannot disregard contract language or revise the contract. *Seattle Prof'l Eng'g Emps. Ass'n. v. Boeing Co.*, 139 Wn.2d 824, 833, 991 P.2d 1126 (2000).

The plain language of the Contract and RFP illustrates the Authority must include all new Medicaid enrollees—including those who will ultimately be assigned based on the Family Connect and Plan Reconnect policies—in the Assignment Methodology. The reason these clients must be included in the pool is that Plan Reconnects and Family Connects are "potential enrollees" as defined in the Contract. A "potential enrollee" is "any individual eligible for enrollment in Healthy Options under this Contract who is not enrolled with" a Plan. CP 2559 (Contract, § 1.70).

Section 5.14.1 of the Contract provides that potential enrollees who "do not select a [Plan] shall be assigned" to one by the Authority in accordance with that section. *See* CP 2594. Section 5.14.1.1 then states that "assignments will be made as described in the [RFP] that resulted in this Contract." *Id.* In turn, Section D of the RFP spells out the percentages of assignments to which the Plans are entitled under the Assignment Methodology. CP 2537-38.

It is irrelevant if an enrollee who does not make a choice is a Family Connect, Plan Reconnect, or neither, since the Authority must "assign" the enrollee. "Assign" or "assignment" means the Authority "selects [a Plan] to serve a client who has not selected" one. WAC 182-538-060; CP 2562 (Contract § 2.4, providing that contractors

must comply with applicable law). Simply put, "assignment" encompasses any enrollee who has not selected a Plan.

Taken together, the only plausible interpretation of the Contract, the RFP, and WAC 182-538-060 is that "assignments" includes all enrollees who must be assigned, which by definition includes Family Connects and Plan Reconnects.

The trial court purported to hold the Authority "to the clear language of the [C]ontract." RP 62 (January 15, 2014). This is untenable, because there is nothing in the Contract or RFP that excludes Family Connects or Plan Reconnects from the Assignment Pool. Whether the assignment occurs by operation of law is immaterial because these enrollees are still "assignments." The trial court erred in ruling the Authority breached the Contract's plain language, because the plain language can only be interpreted in the Authority's favor. In fact, the Legacy Plans did not even make a plain-language argument, relying instead on extrinsic evidence. CP 1577-93.

b. The Extrinsic Evidence Shows There Are Genuine Issues Of Material Fact

The Legacy Plans argued their interpretation of the Contract was correct because of (1) the Authority's "course of performance" in the first month of the Contract; (2) their "course of dealing" with the Authority

under prior contracts; and (3) the principle of construing ambiguity against the drafter of a contract. CP 1581, 1584, 1587. Each argument only serves to demonstrate there are genuine issues of material fact requiring a trial. Summary judgment is improper to determine a contract's meaning if there is competing extrinsic evidence. *Tanner Elec. Coop. v. Puget Sound Power Light Co.*, 128 Wn.2d 656, 674, 911 P.2d 1301 (1996).

No Relevant Course of Performance: When a contract involves repeated occasions for performance, any repeat performance under terms that vary from the contract may become part of the contract. *Spradlin Rock Prods., Inc. v. Pub. Util. Dist. No. 1 of Grays Harbor Cnty*, 164 Wn. App. 641, 661, 266 P.3d 229 (2011). The Legacy Plans argued the Authority interpreted and initially applied the Contract to exclude Family Connects and Plan Reconnects from the Assignment Pool. CP 1581. But the Authority became aware of enrollment discrepancies in the *first month* of the Contract, investigated, and only a few weeks later communicated a corrective action plan. CP 2505-06 (¶ 24). The Legacy Plans claimed the Authority's findings proved their interpretation is correct, but how the methodology was initially applied is undisputed and inconsequential. The Authority acknowledged its error and promptly made a correction. CP 2506. One month of performance in error that was promptly recognized and corrected does not establish a course of performance that

alters the Contract's plain language. At minimum, the issue is a disputed issue of material fact, and the trial court was not entitled to decide the issue on summary judgment.

No Relevant Course of Dealing: A course of dealing, which can supplement a contract, means a "sequence of previous conduct between the parties [that establishes] a common basis of understanding for their [agreement]." *Puget Sound Fin., LLC v. Unisearch, Inc.*, 146 Wn.2d 428, 436, 47 P.3d 940 (2002). The Legacy Plans asserted that prior Medicaid contracts excluded Family Connects and Plan Reconnects from the assignment language. CP 1585-86. However, prior contracts had an entirely different assignment methodology, legislative backdrop, and parties. The composition of the assignment pool was immaterial in prior contracts because assignments were based on each contractor's overall capacity. By stark contrast, the Assignment Methodology in the Contract is silent as to capacity and is based on percentages of the Assignment Pool. Simply put, how enrollees were assigned under old contracts is irrelevant to the current dispute.

In addition, the New Plans are equally affected by the Assignment Methodology, even though they had no prior course of dealing with the Authority. Also, the RFP and the Contract were issued in the context of Medicaid expansion under the Affordable Care Act, with the Authority

directed to focus on costs, competition, innovation, and developing adequate capacity. Laws of 2011, 1st Spec. Sess., ch. 50, § 213(32). The Authority needed to level the playing field and ensure the New Plans obtained sufficient membership. The Legacy Plans, fully aware of this intent and the significant ways in which the Contract would differ from prior Medicaid contracts, engaged in an extensive legislative and litigation effort to forestall the RFP. CP 2160.

The trial court ignored these differences in the Medicaid contracts, mistakenly believing it would amount to relying on politics. RP 59 (January 15, 2014) (rejecting arguments based on the legislative backdrop in which the Contract was formed because politics "[don't] have anything to do with the way I decide this case.") It is true the judiciary does not make political decisions and should "not be drawn into tasks more appropriate to another branch." *Brown v. Owen*, 165 Wn.2d 706, 719, 206 P.3d 310 (2009). However, the policy considerations here, made by political actors, who were heavily lobbied by the Legacy Plans, were integral to the context in which the Authority procured the Contract. To the extent the trial court relied on context to interpret the Contract, it was inappropriate to consider some evidence and disregard other evidence.

"Construing Against the Drafter" is Inapplicable: The Legacy Plans argued any ambiguity must be construed against the Authority

because it drafted the Contract. CP 1587-88. They claimed that if the Authority had wanted to include Plan Reconnects and Family Connects in the Assignment Pool, "it could have done so explicitly." CP 1588. That argument is inconsistent with the Contract's plain language. Family Connects and Plan Reconnects were explicitly included in the Assignment Pool because they are considered "potential enrollees" (as defined in the Contract), and it would have taken explicit language to *remove* them from the pool.

Furthermore, if the Contract is construed against the Authority, then it necessarily must also be construed against the New Plans. If the Authority had agreed with the Legacy Plans, then the New Plans could have claimed the Contract must be construed against the Authority and, therefore, the Legacy Plans. This would lead to the absurd result of the Contract meaning the opposite of whatever the Authority argued it meant. The principle of interpreting a contract against the drafter cannot resolve these issues, especially as a matter of law on summary judgment. The trial court relied on this theory by ruling it would "interpret the contract against [the Authority] as to its plain language." RP 61 (January 15, 2014). But only an ambiguous contract is subject to this rule of construction; it cannot be used to interpret plain language. *Forest Mktg. Enterprises, Inc. v.*

Dep't. of Natural Res., 125 Wn. App. 126, 132-33, 104 P.3d 40 (2005). Accordingly, the trial court erred and should be reversed.

Extrinsic Evidence is Contrary to the Legacy Plans' Interpretation: Although extrinsic evidence is not necessary to construe the Contract, given that the language plainly requires including Family Connects and Plan Reconnects in the Assignment Pool, the extrinsic evidence is consistent with the plain language of the Contract. The trial court erred in failing to consider the extrinsic evidence that proves the Authority always intended the Assignment Methodology to favor new entrants to Washington's market and include Plan Reconnects and Family Connects in the pool.

The Legacy Plans' discussion of extrinsic evidence focuses on their subjective interpretation. Extrinsic evidence is inadmissible to show unilateral or subjective intent as to a contract's meaning or to vary, contradict, or modify the contract's written language. *Go2Net, Inc. v. C I Host, Inc.*, 115 Wn. App. 73, 84-85, 60 P.3d 1245 (2003). Courts focus on objective manifestations of a contract rather than a party's subjective intent. *Brogan & Anensen, LLC. v. Lamphiear*, 165 Wn.2d 773, 776, 202 P.3d 960 (2009).

In applying the "context rule," courts must consider "the subject matter and objective of the contract." *Tjart v. Smith Barney, Inc.*,

107 Wn. App. 885, 895, 28 P.3d 86 (2001). The objective of the Contract stands in direct conflict with the Legacy Plans' reading. The objective was to increase competition, encourage innovation, and develop adequate capacity to meet the needs of Medicaid under the Affordable Care Act by bringing new companies into the market and giving them preferential assignments to ensure their viability. To accomplish this intent, the Assignment Methodology included all enrollees, including Plan Reconnects and Family Connects. CP 2505 (¶ 21); CP 2722-23 (9:22-10:3).

The New Plans echo the Authority's understanding that the methodology would include all enrollees, and they were not told otherwise. CP 2189 (¶¶ 6-7); CP 2314 (¶¶ 8-9); CP 1050 (¶ 4). The Legacy Plans clearly understood the Authority's objectives; before executing the Contract, they complained that the methodology "significantly disadvantage[d]" them. CP 3077. CHPW expected to receive minimal enrollment (such as only 900 out of a hypothetical pool of 10,000 in King County), CP 3139, and Molina anticipated losing membership. CP 3200.

Excluding Plan Reconnects and Family Connects from the pool would contradict the understanding of the Contract of all the parties and be inconsistent with the RFP's intent. Approximately 70% of monthly

enrollment is either a Plan Reconnect or Family Connect enrollee. CP 3207. If that significant population were excluded from the pool, the outcome would be enrollment overwhelmingly favoring the Legacy Plans. That is exactly what happened before the Authority corrected its inadvertent error. CP 3161, 3166-70, 3179.

The Legacy Plans Acknowledge the Underlying Issue is Political, Not Legal: Additional extrinsic evidence shows that the parties, including the Legacy Plans, understood that the new assignment methodology would heavily favor the New Plans, which runs directly contrary to the Legacy Plans' proposed interpretation of the Contract.

The Legacy Plans knew before submitting their bids that the State was entering a new era in Medicaid managed care under the Affordable Care Act and had the goal of allowing new contractors into the business. Fearful of a reduced market share, the Legacy Plans made every attempt to convince the Governor and the Legislature to force the Authority to change the RFP. The Legacy Plans initially discussed their strategy in an email before the RFP was issued, in which they contemplated how to convince legislators to steer business their way. CP 3262. After the RFP was issued, CHPW devised a "cheat sheet" for use with legislators, which expressed concerns about potential enrollment for the New Plans. CP 3265-66. The Legacy Plans then compared notes on meetings with the

House Speaker and the Senate Majority Leader in which the Legacy Plans described the client-assignment issue and how "the out-of-state plans" were being favored. CP 3268. Even after the Authority announced the winning bidders under the RFP, CHPW's lobbyist emailed the Speaker to remind him of a recent meeting regarding the RFP and implore him to intervene with the Authority and legislative staff to alter the client-assignment process. CP 3272.

The Legacy Plans told legislators the methodology put them "at an incredible disadvantage." CP 3139. The Legacy Plans admitted that any enrollee who did not affirmatively choose a Plan was placed in the Assignment Pool and subject to the Assignment Methodology, directly contrary to their contention now. *Id.* (explaining that 80% of enrollees do not choose a Plan and therefore are "put into an assignment algorithm"). These "objective manifestations" illuminate what the Legacy Plans understood to be the intent of the Contract. *Hearst Commc'n, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005).

The Court should not provide the relief the Legacy Plans could not get through the elected branches. The judiciary strives to protect its institutional integrity and should "not be drawn into tasks more appropriate to" the other branches. *Brown*, 165 Wn.2d at 719.

No Unilateral Amendment or Unilateral Mistake: The Legacy Plans argue the Authority unilaterally amended the Contract or made a unilateral mistake as to the outcome of the assignment process. CP 1591-92. Neither argument has merit. First, the Authority did not unilaterally amend the Assignment Methodology. The Contract requires inclusion of Plan Reconnects and Family Connects in the methodology, and when the Authority realized it was assigning clients incorrectly, it rectified the mistake.

The Legacy Plans are trying to seize on the Authority's error to gain an unfair windfall that no party bargained for. Neither the mistake nor the correction was a unilateral amendment. The correction was to ensure adherence to the Contract as written and intended.

The "unilateral mistake" argument is similarly misguided. The doctrine of unilateral mistake only applies as a defense to the enforcement of a contract term. *Brinkerhoff v. Campbell*, 99 Wn. App. 692, 700, 994 P.2d 911 (2000). A mistake is unilateral "[i]f one party has no independent knowledge and accepted another's analysis and opinion[.]" *Seattle-First Nat. Bank v. Earl*, 17 Wn. App. 830, 835-36, 565 P.2d 1215 (1977). The Authority has not asserted unilateral mistake as a defense. The "mistake" was not how the Contract was written; the mistake was that

the Authority had inadvertently not updated its ProviderOne system before implementing the Assignment Methodology in July 2012.

C. The Court Should Reverse The Trial Court's Granting Of The Motion On Procedural Claim

1. The Trial Court Erred In Its Application Of CR 56

The Court should reverse the Order on Procedural Claim because the Legacy Plans have not met their burden under CR 56 of showing that there are no genuine issues of material fact and that they are entitled to judgment as a matter of law. *Owens*, 173 Wn.2d at 49. At minimum, the Authority has established issues of material fact regarding the differing interpretations of the Contract, as well as the degree of decision-making power, if any, the Director delegated to Mr. King. The granting of summary judgment should be overturned and the case remanded for trial.

2. The Contract Contains A Dispute Clause Providing An Informal Process And Discretion To The Director

Section 2.9.2 of the Contract provides:

> Requests for a dispute resolution hearing shall be mailed to the Director . . . within fifteen (15) calendar days after the Contractor receives notice of the disputed issue(s). The Director will determine a time that is mutually agreeable to the parties during which they may present their views on the disputed issue(s). *The format and time allowed for the presentations are solely within the Director's reasonable discretion, but it is understood that such presentations will be informal in nature*. The Director will provide written notice of the time, format, and location of the presentations. *At the conclusion of the presentations, the Director will consider all of the evidence available and shall render a written recommendation as soon as practicable*, but in no event more

> than thirty (30) calendar days after the conclusion of the presentations. The Director may appoint a designee to hear and determine the matter.

CP 2566 (emphasis added).

In accordance with this section, the Director designated Mr. King to listen to the presentations at the conferences, but not to determine the issues. He was simply to provide a recommendation to the Director, who then would make the final decision.

The Legacy Plans claim Mr. King's unsigned, undated, unreviewed, unpublished, and unsent draft recommendation is a binding and dispositive determination under the Administrative Procedure Act ("APA"). CP 1975. The conferences were not governed by the APA, and none of its procedural or evidentiary safeguards applied. They were informal proceedings governed by the Contract, presided over by an Authority employee who himself explained that the process was informal and that sworn testimony would not be given. The Legacy Plans acknowledged that Director Lindeblad would make the decision. CP 2265-66. Plus, three of the six parties to this case did not take part in the informal dispute conferences.

The Legacy Plans have never explained how the Director was required to, or did, cede her power to a subordinate. Mr. King "understood that his role as designee [for the conferences] was different

from his job as a review judge[.]" Ruling Granting Review at 5 n.3. As a review judge, Mr. King presided over highly structured and formal proceedings involving the APA. CP 3217-18. But here, Mr. King was acting "under the terms of the contract" rather than administrative law. CP 3221. Neither the Director nor her staff told Mr. King he had final authority, and the parties understood that Mr. King would consult with the Director after the hearings. CP 2265-66 (¶¶ 6-7). Given these facts, at a minimum there is a disputed issue of material fact, and the trial court erred by granting summary judgment.

3. The Director Did Not Delegate Her Authority To Mr. King, Which Mr. King Has Acknowledged

From the very inception of the process to select an employee to preside over the conferences, Director Lindeblad was clear that she did not wish to delegate her decision-making authority. Mr. King was selected primarily because Director Lindeblad was not available for the conferences and did not want to delay them, and Mr. King was available. CP 2293 (¶ 13). Director Lindeblad clearly stated to her staff that she was not delegating her decision-making authority, and Mr. King was explicitly told that the Director would make any final decision. *Id.*

The Authority routinely attempts to resolve disputes outside of court, with varying parameters and levels of formality. The dispute processes are

governed by rule or by contract. CP 2298 (¶ 7). The Authority has a comprehensive list of "best practices" that staff use at conferences, including an emphasis on informality and the prerogative of Authority management to decide the issue. CP 2299-300 (¶ 10). The conferences are not adjudicative proceedings, and conference chairs do not act as judges. CP 2299 (¶ 9). In light of this course of business, and given the lack of evidence from the Legacy Plans, it is implausible to conclude that the Director ceded her power to Mr. King.

Mr. King is an Authority employee whose regular duties are to review Medicaid program appeal decisions made by a separate agency, the Office of Administrative Hearings. CP 2293-94 (¶ 15). Mr. King usually presides over appeals that arise under the APA (primarily Medicaid benefit appeals). CP 3211 (8:5-21). In this case, neither the APA nor the Office of Administrative Hearings was involved.

Mr. King chose an administrative assistant, Christin Gregerson, to help him take notes during the conference. CP 2301 (¶ 12). Mr. King instructed her to take comprehensive notes because he wanted to use them as he prepared his recommendation to Director Lindeblad. CP 2265 (¶ 4). Ms. Gregerson's declaration clearly illustrates that Mr. King himself understood that he had to meet with the Director before any final decision was issued and that the process was informal. CP 2265.

In addition, Mr. King was told before the conferences that he would have to meet with Director Lindeblad before any decision was issued. CP 3212, 3213-14, 3216 (25:2-7; 50:19-51:3; 83:19-23).

4. Mr. King Advised That The Process Was Informal And That The Director Would Make The Final Decision

Virtually every aspect of the dispute conferences show that, contrary to the Legacy Plans' argument below, the conferences were not APA proceedings. First and foremost, Mr. King explicitly stated that the conferences were not APA hearings and that Director Lindeblad was to have the final say. CP 2265 (¶ 5). Mr. King also explained that he should not be called "judge" because he was just another lawyer that day, no one was put under oath, the conferences were closed to the public, and other interested parties were not allowed to present testimony. *Id.*; *see also* CP 3058; CP 2748-49 (110:25-111:6); CP 3226; CP 2749 (111:7-12); CP 2265 (¶ 5); CP 3219 (106:4-6). He also stated that Director Lindeblad was to have the final say. CP 2265 (¶ 5).

At the Molina conference, Mr. King stated that he would give his recommendations to the Director and that the Director would make the final decision. CP 2265-66 (¶¶ 5, 6). At the CHPW conference, Mr. King made essentially the same remarks. CP 2266 (¶ 7). CHPW's legal counsel later

acknowledged that Mr. King would only transmit a decision after consulting with Director Lindeblad. CP 3229.

5. The Director Did Not Delegate Her Power To Make The Final Decision

At no time did Director Lindeblad consider or determine that Mr. King would make the final decision. CP 2293-94 (¶¶ 14, 15). Director Lindeblad retained the power to decide the dispute because the business issues had to be considered in the larger context of the Authority's mission to serve vulnerable Medicaid clients through all five Plans. CP 2293 (¶ 14). From the Director's perspective, whatever the outcome of the conferences, Medicaid clients should not bear the brunt of a dispute that could potentially cause them insecurity, disruption, or confusion about their health care. *Id.*

Mr. King never was given, never was told, and never testified that he was vested with final decision-making authority. He acknowledges his scope of designation was limited. CP 3213, 3223 (50:11-23, 110:11-20).

6. The Director Met With Mr. King And Then Conferred With All Plans Before Making The Final Decision

In accordance with her previous, explicit instructions to staff that Director Lindeblad did not delegate her decision-making authority, the Director met with Mr. King and others on October 26, 2012 and, for the first time, saw his unsigned draft recommendation. CP 2294 (¶ 17).

Director Lindeblad did not place any significance on it since she had not relinquished her authority to decide the matter and was more concerned with the substance of the issues. *Id.*

After taking a few days to contemplate the dispute, the Director sent a letter to all Plans dated November 1, 2012, recommending they meet to see if a collaborative solution could be developed. CP 2294 (¶¶ 18, 19).

> My authority under the dispute provision of the Contract is contained in Section 2.9.2 . . . [U]nder Section 2.9.2 of the Contract, and after conferring with Mr. King, my recommendation is the following: At the earliest convenient time, a facilitated discussion should be held at the Agency's headquarters in Olympia with participation by representatives of Legacy Plans, the New Plans, and the Agency, as well as a facilitator.

CP 1769.

CHPW responded on November 7, 2012, but again did not question the Director's authority to render a recommendation. CP 3231. At its CR 30(b)(6) deposition, CHPW testified it simply did not know why it failed to contend that Mr. King had final decision-making authority. CP 3061-62 (196:9-197:3). CHPW conceded the Director was issuing a "recommendation" and hoping for consensus among all Plans. *Id.*

The Authority and all Plans met on November 14, 2012, but the issues were not resolved. CP 2294 (¶ 19). A week later, Director Lindeblad

sent a letter to all Plans announcing her decision on the client-assignment issue. CP 2294 (¶20).

7. The Director Acted Within Her Statutory And Contractual Authority In Making The Final Decision On The Disputes

As an executive agency, the Authority must necessarily act through individuals, and the individual who oversees the Authority is the Director, who is appointed by the Governor. RCW 41.05.021(1). The Director may employ the staff necessary to administer Medicaid and other healthcare programs. *Id.*; *see also* RCW 41.05.021(1)(m)(i). The Director may, but is not required to, delegate "any power or duty vested in him or her by law" to staff. *Id.*

Under this statute and Section 2.9 of the Contract, Director Lindeblad had full authority to delegate all or only a portion of the tasks related to the dispute conferences. Director Lindeblad limited her delegation of authority to Mr. King "to facilitate the dispute conferences even though his regular duties were to review Medicaid program appeal decisions." CP 2293 (¶ 13). Director Lindeblad did not want to delegate the final outcome of the process. CP 2293 (¶14). While Mr. King was to *hear* the informal conferences, Director Lindeblad retained the power to decide the outcome. *Id.* Accordingly, Mr. King was not serving in any sort of decision-making role, much less a judicial one. CP 3215 (74:6-15),

CP 3221 (108:11-15). This is no different from any corporate CEO delegating a task with the requirement that staff report back for a final decision.

In addition, Mr. King explained the conferences were not APA adjudicative hearings, were not governed by the APA, and lacked any qualities of a formal adjudicative hearing. CP 3217-3220 (104:21-107:17). Mr. King agreed the conferences were informal, whereas APA hearings are "highly structured." CP 3218-3220 (105:22-107:17).

The trial court erred by holding that the recommendation by Mr. King to the Director was binding on the Director and the agency, when this was contrary to the Contract, the APA, and the facts. The Court must review the evidence "in the light most favorable to" the nonmoving party, who need only present "sufficient evidence" that "a material issue of fact" exists. *Michelbrink,* 180 Wn. App. at 666, 668. The Authority has met its burden.

D. The Legacy Plans Should Be Equitably Estopped From Pursuing The Procedural Claim

The Legacy Plans, knowing Mr. King did not have final authority, should be equitably estopped from waiting until well after the process was over before raising the alleged defect. Equitable estoppel applies when there is (1) an admission, statement or act inconsistent with a claim

afterwards asserted, (2) action by another in reasonable reliance upon that act, statement or admission, and (3) injury to the relying party from allowing the first party to contradict or repudiate the prior act, statement, or admission. *Lybbert v. Grant Cnty.*, 141 Wn.2d 29, 35, 1 P.3d 1124 (2000).

All parties knew a recommendation would not be issued without the Director's involvement. CP 2265-66 (¶¶ 5, 6). The Director issued an initial recommendation following her consultation with Mr. King, and neither Plan questioned the propriety. There was even another conference, which all five Plans attended, preceding the Director's ultimate recommendation. CP 1769, 2294 (¶ 19). The Legacy Plans did not question the procedure until after they obtained Mr. King's draft recommendation through discovery. The Legacy Plans had many opportunities to ask the Authority to follow the procedure they claim the Contract requires at a time when the Authority could have addressed the issue and perhaps taken a different course. They did not, and the Authority acted in reliance by continuing with the process outlined in the Contract. The Authority will be injured if the Legacy Plans can pursue the argument as a basis for damages.

E. The Dispute Resolution Clause Does Not Dictate A Final And Binding Decision

The Legacy Plans' argument rests on the false premise that Section 2.9 of the Contract amounts to a binding dispute resolution clause. Section 2.9 applies when the Authority must "address" a dispute. CP 2566 (§ 2.92 of Contract). The hearing is informal and conducted within the Director's discretion. The Director ultimately makes a "recommendation." *Id.* The Contract does not say the recommendation is final or binding. Any power the Director had to bind the Authority flows from her statutory authority as Director, not from the Contract. In contrast, any authority Mr. King had flowed from directions he received from his superior, the Director.

F. The Legal Status Of Mr. King's Draft Recommendation Is Moot

Even if Mr. King's draft recommendation were treated as a final Authority decision, it would not entitle the Legacy Plans to summary judgment and damages. The basis of his recommendation was that the Authority could not unilaterally amend the Contract. CP 1749. In contrast, the Director's recommendation was that the Contract was incorrectly interpreted at the outset. CP 2294, 2295, 2507. Those positions are not mutually exclusive. Even if Mr. King had issued his draft, it would not have prevented the Director from subsequently deciding the Contract had been incorrectly interpreted and that no unilateral

amendment was necessary. The Legacy Plans could then have sued and this case would be in precisely the same posture.

The legal status of Mr. King's decision is moot. Before ruling against the Authority, the trial court seemed to agree, stating, "[w]ell, if the procedure was flawed it would still get to this Court to decide whether or not the contract was breached." RP 64:20-23 (January 15, 2014). On these facts, summary judgment is inappropriate.

G. The Legacy Plans Withdrew Their Request For Equitable Relief

The Legacy Plans dismissed their claim for injunctive or declaratory relief but nevertheless sought declaratory relief in the Motion on Procedural Claim. "Declaratory relief" is "a unilateral request to a court to determine the legal status or ownership of a thing." Black's Law Dictionary 1404 (9th ed. 2009). The Legacy Plans asked the trial court to bind the Authority to Mr. King's draft, unsigned, undated, unreviewed, and unsent recommendation. CP 1975. In other words, the Legacy Plans sought a determination of the legal status of his draft.

The Legacy Plans claim they are merely asserting a breach of contract. The breach, if any, was the Director (instead of Mr. King) issuing a recommendation. There is nothing in the Contract stating the remedy for a procedural defect is that the party asserting a dispute

automatically prevails. The only way the alleged breach can be tied to damages is by way of a declaratory ruling that the draft recommendation is a final agency action. Because the Legacy Plans dismissed their request for declaratory relief, the trial court erred by granting such relief.

H. The Trial Court Erred On Both Claims Because The Legacy Plans Did Not Establish Causation Or Damages

To establish breach of contract, the Legacy Plans must prove valid contractual obligations, breach, causation, and resulting damage. *Nw. Indep. Forest Mfrs. v. Dep't of L&I*, 78 Wn. App. 707, 712, 899 P.2d 6 (1995). The Legacy Plans had the burden of showing the absence of an issue of material fact. *Burton v. Twin Commander Aircraft LLC*, 171 Wn.2d 204, 222, 254 P.3d 778 (2011). The Legacy Plans failed in both motions to meet this burden. The Motion on Substantive Claim does not mention causation and has only three superficial lines about damages, with no cites to any evidence. A conclusory statement without analysis or evidence is insufficient to meet the summary judgment burden. *Johnson v. Recreational Equip. Inc.*, 159 Wn. App. 939, 954, 247 P.3d 18 (2011).

Meanwhile, the Motion on Procedural Claim did not even allege, let alone prove, causation or damages. Despite these flaws, the trial court "[couldn't] think of any way that there wouldn't be causation" and the mere fact of the Authority's correction established damages because it was

"against the plaintiffs." RP 63 (January 15, 2014). The trial court's rationale conflicts with CR 56, which requires evidence be viewed in the light most favorable to the Authority and that the Legacy Plans establish the absence of issues of material fact. The Authority had no basis to offer contrary evidence on causation or damages, since the Legacy Plans presented nothing.

VI. CONCLUSION

The Court should reverse both of the trial court's orders granting summary judgment to the Legacy Plans. There are genuine issues of material fact that preclude summary judgment.

RESPECTFULLY SUBMITTED this 15th day of September, 2014.

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Proof of Service

I, Kristi Basic, state and declare as follows:

I am a citizen of the United States of America and over the age of 18 years and I am competent to testify to the matters set forth herein. On September 15th, 2014, I served a true and correct copy of the **Petitioners Opening Brief** on the following parties to this action, via Electronic Mail (*per stipulated agreement by all parties*) to:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 15th day of September, 2014, at Tumwater, Washington.

KRISTI BASIC
Legal Assistant

WASHINGTON STATE ATTORNEY GENERAL

September 15, 2014 - 3:52 PM

Transmittal Letter

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Court of Appeals Case Number: 45881-1

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Opening Brief of Appellants

Sender Name: Kristi Basic - Email: kristib3@atg.wa.gov

A copy of this document has been emailed to the following addresses:

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